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No.

In the

Supreme Court of the United States

October Term, 1996

STATE OF LOUISIANA, et al.,

Petitioners,

versus

JENNIFER MISTRETTA, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does Title VII (42 U.S.C. Section 2000e *et seq.*) contain an unequivocal abrogation of the States' Eleventh Amendment immunity "in unmistakable language in the statute itself," as mandated by this Court's decision in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985), so as to permit a Title VII action by an individual against an unconsenting state in federal court?

PARTIES

The parties in this Court and the courts below are as follows:

Petitioners: The State of Louisiana through the Department of Public Safety and Corrections, Office of State Police, and James Timothy Brunett, who are the defendants in the district court and the appellants in the Court of Appeals.

Respondents: Jennifer Evans Mistretta and Troy Mistretta, who are the plaintiffs in the district court and the appellees in the Court of Appeals.

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PETITION FOR WRIT OF CERTIORARI

The petitioners urge that a writ of certiorari issue to review the ruling of the United States Court of Appeals for the Fifth Circuit which affirmed a decision of the United States District Court for the Middle District of Louisiana. That ruling denied petitioners' assertion of immunity from suit in federal court under the Eleventh Amendment to the United States Constitution, which was initially raised via a motion to dismiss pursuant to Federal Rules of Civil Procedure, Rule 12(b)(1).

OPINIONS BELOW

The March 26, 1997, Opinion of the United States Court of Appeals for the Fifth Circuit, which affirmed the denial of petitioners' motion to dismiss asserting Eleventh Amendment immunity, is unreported and is reprinted at Appendix A to this petition, p. App. 1. The August 21, 1996, Ruling of the United States District Court for the Middle District of Louisiana on petitioners' motion to dismiss, which denied petitioners' assertion of immunity under the Eleventh Amendment, is unreported and is reprinted at Appendix B to this petition, p. App. 4. The April 22, 1997, Ruling on Petitioners' Suggestion for Rehearing En Banc by the United States Court of Appeals for the Fifth Circuit is unreported and is reprinted at Appendix C to this petition, p. App. 6.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on March 26, 1997, affirming the district court's denial of petitioners' assertion of Eleventh Amendment immunity. By Order dated April 22, 1997, the Court of Appeals denied petitioners' Suggestion for Rehearing En Banc.

This Court has jurisdiction under 28 U.S.C. Section 1254(1). Petitioners seek review of the denial by the Court of Appeals of their assertion of immunity from suit in federal court pursuant to the Eleventh Amendment to the United States Constitution. *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, ____ U.S. ____, 113 S.Ct. 684, 121 L.Ed.2d 605 (1993). The issue presented is a question of law concerning the identity of the essential elements of respondents' claims.[1]

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[1] *Johnson v. Jones*, ___ U.S. ___, ___, 115 S.Ct. 2151, 2158, 132 L.Ed.2d 238 (1995).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions are involved in this case:

United States Constitution

U. S. Constitution, Eleventh Amendment

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

United States Code

42 U.S.C. Section 2000e(a) and (b)

For the purposes of this subchapter—

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person...

STATEMENT OF THE CASE

Respondents, Jennifer and Troy Mistretta, are both employed by petitioner, the State of Louisiana through the Department of Public Safety and Corrections, Office of State Police (Louisiana State Police). Petitioner James Timothy Brunett was formerly employed by Louisiana State Police, and in that capacity was a supervisor of Jennifer Mistretta.

On July 27, 1995, respondents filed their original complaint pursuant to 42 U.S.C. Section 2000e *et seq.* (Title VII), 42 U.S.C. Section 1981a, and various provisions of Louisiana state law, alleging that Jennifer Mistretta was subjected to sex-based discrimination and harassment by Louisiana State Police, in the form of sexually-oriented comments and unwarranted disciplinary action by her supervisors, and (on at least one occasion) an off-color remark purportedly directed at Mrs. Mistretta by petitioner Brunett. Jennifer Mistretta's husband, Troy Mistretta, alleges that as a result of the alleged discrimination and harassment directed towards his wife, he has suffered loss of consortium, services, and society.[2]

On November 13, 1995, respondents filed an Amending and Supplemental Complaint adding, *inter alia*, a claim under 42 U.S.C. Section 1983.[3]

Only respondents' claims under Title VII are relevant to this petition. On July 30, 1996, petitioners filed a motion to dismiss pursuant to F.R.C.P. Rule 12(b)(1), raising an assertion of Eleventh Amendment immunity to respondents' Title VII

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[2] As this appeal concerns only the purely legal question of petitioners' entitlement to Eleventh Amendment immunity, the specifics of respondents' claims are not relevant.

[3] Respondents' claims for punitive damages under Section 1981a, as well as all state law claims against the state of Louisiana, were dismissed pursuant to a F.R.C.P. Rule 12(b)(6) motion to dismiss. The district court deferred ruling on petitioner Brunett's motion to dismiss respondents' state law claims against him until remand of the case by the Fifth Circuit.

claims. Petitioners asserted that respondents' Title VII claims against petitioners in federal court are barred by the Eleventh Amendment, as Title VII does not contain the kind of unequivocal textual abrogation of the States' Eleventh Amendment immunity mandated by prior decisions of this Court, beginning most notably with *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985). Petitioners argued that, while under normal rules of statutory construction the terms "governments" and "governmental agencies" utilized in Title VII might include the States and state agencies, these terms do not evince an unmistakable congressional intent to subject unconsenting States to the jurisdiction of the federal courts.

On August 21, 1996, the district court entered a ruling denying petitioners' motion to dismiss. Appendix B to this petition, p. App. 4.[4] The district court relied primarily on *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976), a case decided a full nine years before this Court clearly articulated the standard for abrogation in *Atascadero*. The district court also relied on this Court's recent ruling in *Seminole Indian Tribe of Florida v. Florida*, ____ U.S. , 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996), reasoning that since this Court did not question *Fitzpatrick* in that case, *Fitzpatrick* must be controlling. However, while *Seminole* did reaffirm the "unmistakable language" test of *Atascadero*, it was silent on the application of that test to Title VII.

On September 9, 1996, petitioners filed a timely notice of appeal to the United States Court of Appeals for the Fifth Circuit, appealing from the district court's denial of petitioners' assertion of Eleventh Amendment immunity. The Court of

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[4] By Order of Reference dated October 31, 1995, this matter was referred to a United States Magistrate Judge for the conduct of all proceedings and the entry of judgment, in accordance with 28 U.S.C. Section 636(c). Appendix D to this petition, p. App. 8.

Appeals had jurisdiction pursuant to 28 U.S.C. Section 1291 and F.R.A.P. Rule 4. Further, the Court of Appeals had jurisdiction to review the denial of petitioners' Eleventh Amendment immunity assertion under the collateral order doctrine. *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, ____ U.S. ____, 113 S.Ct. 684, 121 L.Ed.2d 605 (1993).

By an unreported decision entered March 26, 1997, the Court of Appeals affirmed the district court's denial of petitioners' motion to dismiss. Appendix A to this petition, p. App. 1. While noting petitioners' arguments that Title VII fails to meet the heightened standard of statutory construction imposed by *Atascadero*, and that *Fitzpatrick* was at least modified if not tacitly overruled by *Atascadero*, the Fifth Circuit nevertheless relied on *Fitzpatrick* for the proposition that Congress properly abrogated the States' Eleventh Amendment immunity in Title VII. The Fifth Circuit also relied on *Pegues v. Mississippi State Employment Service*, 899 F.2d 1449 (5th Cir. 1990), for this proposition. Petitioners had argued that *Pegues* was decided erroneously, since that case cited *Atascadero* only for the proposition that a state may waive its immunity, and contains neither a discussion of the "unmistakable language" test nor application of that test to Title VII.

The Fifth Circuit concluded by stating that, "However appealing Louisiana's argument may be...it is addressed to the wrong court." Appendix A at p. App. 3.

On April 9, 1997, petitioners' timely filed a Suggestion for Rehearing En Banc, pursuant to F.R.A.P. Rule 35. By Order entered April 22, 1997, petitioners' Suggestion for Rehearing En Banc was denied. Appendix C to this petition, p. App. 6.

This timely petition for writ of certiorari follows.

REASONS FOR GRANTING THE WRIT

CONTRARY TO BINDING SUPREME COURT PRECEDENT, THE FIFTH CIRCUIT FOUND CONGRESSIONAL ABROGATION OF THE STATES' ELEVENTH AMENDMENT IMMUNITY IN TITLE VII WITHOUT APPLYING THE STRINGENT TEST SET FORTH IN *ATASCADERO STATE HOSPITAL V. SCANLON.*

The Court of Appeals for the Fifth Circuit has failed to answer the only question relevant to this case, and the question petitioners now ask this Court to address: Why should Title VII be excused from meeting the stringent requirements of *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985), which this Court expressly made applicable to all congressional enactments?

The Fifth Circuit has entered a decision in direct conflict with prior decisions of this Court. Supreme Court Rule 10(c). In *Atascadero*, this Court stated in no uncertain terms that Congress must express its intention to abrogate the protections of the Eleventh Amendment "in unmistakable language in the statute itself." 473 U.S. at 243, 105 S.Ct. at 3148. Yet despite this Court's clear pronouncements in *Atascadero* and its progeny, the Fifth Circuit relied on cases pre-dating *Atascadero*, and on another erroneously decided Fifth Circuit case, in rejecting petitioners' argument that Title VII fails to pass the test established by this Court for determining whether Congress has properly exercised its power to abrogate. Petitioners submit that this Court should grant certiorari in order to resolve the issue of whether or not Title VII abrogates the States' Eleventh Amendment immunity, and to reaffirm again the principles of *Atascadero*.[5]

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[5] Petitioners believe this issue to be *res novae*. Exhaustive research has discovered no case which addresses the specific issue of whether the statutory language of Title VII meets the "unmistakable language" test set forth in *Atascadero*.

A. Any congressional enactment, such as Title VII, which is purported to abrogate the States' Eleventh Amendment immunity presents an important question of federal law.

Given the long line of consistent rulings by this Court, dating at least to *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed.2d 842 (1890), there can be no doubt that few issues of federal law, or Federalism itself, are as significant as the protections provided to the individual States by the Eleventh Amendment. This Court's recognition of the importance of these protections is clear throughout its decision in the seminal case on congressional power to abrogate the Eleventh Amendment. In *Atascadero, supra*, this Court noted that:

> [T]he significance of [the Eleventh] Amendment "lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III" of the Constitution.

473 U.S. at 238, 105 S.Ct. at 3145, citing *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 98, 104 S.Ct. 900, 906, 79 L.Ed.2d 67 (1984). This Court also pointed out that the protections of the Eleventh Amendment are not absolute:

> [T]he Eleventh Amendment is "necessarily limited by the enforcement provisions of Section 5 of the Fourteenth Amendment," that is, by Congress' power "to enforce, by appropriate legislation, the substantive provisions of the Fourteenth Amendment."

Id., citing *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456, 96 S.Ct. 2666, 2671, 49 L.Ed.2d 614 (1976).

Having taken special notice of the traditional balance be-

tween the States' interests and the federal government, this Court explained that:

> Our reluctance to infer that a State's immunity from suit in the federal courts has been negated stems from recognition of the vital role of the doctrine of sovereign immunity in our federal system.

Atascadero, 473 U.S. at 242, 105 S.Ct. at 3147 (quoting *Pennhurst*, 465 U.S. at 89, 99, 104 S.Ct. at 907). Thus, it was made clear that:

> [I]t is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides the guarantees of the Eleventh Amendment. The requirement that Congress unequivocally express this intention in the statutory language ensures such certainty.

Atascadero, 473 U.S. at 243, 105 S.Ct. at 3147. With these considerations in mind, this Court held in simple terms:

> Congress must express its intention to abrogate the Eleventh Amendment in unmistakable language in the statute itself.

473 U.S. at 243, 105 S.Ct. at 3148.

Clearly, this Court needs no further convincing of the importance of any challenge to an enactment which is purportedly a proper exercise of congressional power to nullify what has been deemed "the Eleventh Amendment's role as an essential component of our constitutional structure." *Dellmuth v. Muth*, 491 U.S. 223, 228, 109 S.Ct. 2397, 2400, 105 L.Ed.2d 181 (1989).

B. Despite this Court's clear pronouncement in *Atascadero*, the Fifth Circuit refused to apply the "unmistakable language" test to the provisions of Title VII.

The Fifth Circuit rejected petitioners' argument that the "unmistakable language" test is the only standard by which Title VII is to be measured for proper congressional abrogation of the Eleventh Amendment, despite this Court's clear pronouncements in *Atascadero* and its progeny. The Court of Appeals relied on pre-*Atascadero* decisions, and on another erroneously decided Fifth Circuit case, as its basis for denying petitioners' claim of immunity. This ruling conflicts with the line of cases, beginning with *Atascadero* and recently reaffirmed in *Seminole Indian Tribe of Florida v. Florida*, ____ U.S. , 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996), which clearly establishes the stringent test under which all enactments are to be reviewed for a proper exercise of Congress' power of abrogation.

In its unreported decision, the Fifth Circuit rejected petitioners' claim of immunity with the following:

> We need not consider whether, were we to address this issue as one of first impression, we would decide that the mere authorization of suits against "governments" is the sort of unequivocal statutory language that *Atascadero* requires. Prior decisions of both the Supreme Court and this court foreclose Louisiana's argument.
>
> In *Fitzpatrick v. Bitzer*...the Court held that Congress had abrogated the states' Eleventh Amendment immunity by enacting Title VII....Although the focus of the decision was congressional

> power to abrogate under [Section] 5 of the Fourteenth Amendment, the Court also stated that "the threshold fact of congressional authorization to sue the State as employer is clearly present"....This aspect of the decision was confirmed in *Quern v. Jordan*, 440 U.S. 332 [99 S.Ct. 1139, 39 L.Ed.2d 358] (1979), where the Court explained that the *Fitzpatrick* majority had "found present" "the 'threshold fact of congressional authorization' to sue the State as employer. . ."

Appendix A at p. App. 2 (citation omitted).

This reasoning essentially expands the district court's perfunctory ruling on petitioners' motion to dismiss, which stated:

> This court declines, for the reasons set forth by the plaintiffs in their opposition memorandum, to reverse *Fitzpatrick*, a 20 year old precedent which the Supreme Court itself in *Seminole* did not question.

Appendix B at p. App. 4.

While courts routinely cite *Fitzpatrick* for the proposition that Congress abrogated the States' Eleventh Amendment immunity through Title VII, a plain reading of the decision shows that it is not so sweeping. The rulings of the Fifth Circuit and the district court demonstrate a misapprehension of petitioners' arguments, and of the holdings of *Fitzpatrick* and *Seminole*. The lower courts' reliance on *Fitzpatrick*, as well as on *Quern* and *Seminole*, is misplaced.

In *Fitzpatrick*, this Court held that it was within the power of Congress, pursuant to Section 5 of the Fourteenth Amendment, to abrogate the States' sovereign immunity by "appropriate legislation." It is crucial to note that absent is any discussion of exactly how Congress must exercise this power (i.e., exactly what constitutes "appropriate legisla-

tion"). Nine years to the day after *Fitzpatrick* was decided, this Court addressed that very issue in *Atascadero*.

In refusing to apply the *Atascadero* test to the language of Title VII, the Fifth Circuit further stated:

> Louisiana protests that because *Atascadero* is the seminal case on precisely what Congress must do to abrogate state immunity, it "at the very least modified *Fitzpatrick*, if not implicitly overruled it." We disagree, for nowhere in *Atascadero* did the court so much as call *Fitzpatrick* into doubt or question its affirmation of that decision in *Quern*.

Appendix A at p. App. 3.

Petitioners never contended that *Atascadero* expressly overruled *Fitzpatrick*, but only that, given the clear pronouncement in *Atascadero*, any statement in *Fitzpatrick* (or any *pre-Atascadero* decision) regarding Title VII must be reevaluated according to the fully articulated standard made applicable by this Court to all congressional enactments. The Fifth Circuit, while acknowledging *Atascadero* as the governing standard, refused to accept the argument that, logically, any decision prior to *Atascadero* that did not evaluate an enactment in light of the "unmistakable language" test can no longer be deemed controlling with regard to that particular enactment. Surely it is a generally accepted principle that when this Court announces a new rule of law, it is unnecessary for it to cite, by name, each and every case that is either overruled or modified, in whole or in part, by that decision.

Even assuming, *arguendo*, that *Fitzpatrick* does purport to address the issue of how Congress must exercise its power to abrogate the Eleventh Amendment, that case can no longer be considered decisive.

Thus, *Atascadero* (decided in 1985) is controlling as to any

issue of Eleventh Amendment abrogation supposedly resolved in *Fitzpatrick* (decided in 1976) or *Quern* (decided in 1979). The test for determining congressional abrogation of the State's Eleventh Amendment immunity announced nine years after *Fitzpatrick* in *Atascadero* (and expressly reaffirmed in *Dellmuth* and *Seminole*) is binding on the Fifth Circuit (and on every court including this one, by virtue of *stare decisis*). The specific holding of *Fitzpatrick* now at issue, that Congress through Title VII abrogated the State's Eleventh Amendment immunity, is simply no longer good law.

The district court (and by implication the Fifth Circuit) also placed great weight on the fact that this Court did not question *Fitzpatrick* in *Seminole*. This is hardly surprising. *Seminole* concerned only the purported abrogation of the Eleventh Amendment in the Indian Gaming Regulatory Act (25 U.S.C. Section 2701 *et seq.*), and whether Article I could be used to circumvent the Eleventh Amendment's limitations on federal jurisdiction. For this Court to question *Fitzpatrick's* position on Title VII and Eleventh Amendment immunity in *Seminole* would be curious, as no Title VII issue whatsoever was presented.

Seminole cites *Fitzpatrick* merely for the proposition that the Fourteenth Amendment allows Congress to abrogate the Eleventh Amendment (i.e., grants Congress the power). *Seminole*, 116 S.Ct. at 1114. *Seminole* does not cite Title VII as an embodiment of the guiding principles of *Atascadero*, nor does it cite *Fitzpatrick* as the final word with regard to Title VII, as the lower courts seem to believe.

Seminole is of significance to the instant case not for what it has to say about *Fitzpatrick* but rather for its reaffirmation of the principle that

> Congress' intent to abrogate the States' immunity from suit must be obvious from "a clear legislative statement."

_____ U.S. at _____, 116 S.Ct. at 1123 (citations omitted). This is merely a restatement of the fundamental test set forth in *Atascadero*. *Seminole* certainly does not hold that any legislation enacted by Congress pursuant to the Fourteenth Amendment is in and of itself sufficient to abrogate the protections of the Eleventh Amendment, and *Atascadero* and *Seminole* directly refute that premise.

Petitioners never challenged congressional power to abrogate the States' Eleventh Amendment immunity. Rather, petitioners challenged the continued reliance on *Fitzpatrick* to answer the question of whether Congress in Title VII properly exercised its power to abrogate this immunity, when the applicable test was not fully articulated until nine years after the *Fitzpatrick* decision. Clearly, such reliance on *Fitzpatrick* is misplaced, and the Fifth Circuit erred when it flatly refused to consider Title VII in light of *Atascadero*.

Petitioners submit that *Atascadero* should no longer be ignored in deference to *Fitzpatrick*, and that this Court should grant this petition so that the issue can finally be resolved.

C. The Fifth Circuit should not have considered *Pegues v. Mississippi State Employment Service* controlling, as that case also ignored binding Supreme Court precedent in concluding that Title VII abrogates the States' Eleventh Amendment immunity.

Finally, in denying petitioners' assertion of Eleventh Amendment immunity, the Fifth Circuit stated that:

> In any case, we are also bound by *Pegues v. Mississippi State Employment Service*, 899 F. 2d 1449, 1453 (5th Cir. 1990), in which we stated that the Civil Rights Act of 1964 "clearly abrogates the states' Eleventh Amendment immunity by pro-

> viding that courts may award retroactive monetary relief against state defendants which violate Title VII."

Appendix A at p. App. 3.

The Fifth Circuit's reliance on *Pegues* is as misplaced as its reliance on *Fitzpatrick*. Nowhere does Title VII provide that the federal courts may award monetary relief against "state defendants" for violations of that Act. If Title VII did expressly include "States" within the definition of "person" or "employer," then perhaps petitioners would have had somewhat less upon which to base a claim of immunity.

The Fifth Circuit in *Pegues* relied on *Fitzpatrick* alone to conclude that Title VII overrides the Eleventh Amendment, and cited *Atascadero* only for the proposition that a state may waive its immunity. 899 F.2d at 1452. *Pegues* contains no discussion of the "unmistakable language" test, clearly the only standard for determining whether Congress' abrogation power was properly exercised. Petitioners again submit that reliance solely on *Fitzpatrick* in the wake of *Atascadero* is misplaced, and that the Fifth Circuit, given the opportunity in this case to apply *Atascadero* to Title VII, should not have relied on an erroneously decided case to make yet another error.

CONCLUSION

Atascadero provides the stringent test by which congressional enactments are measured for proper abrogation of the States' Eleventh Amendment immunity. The Court should grant this petition for writ of certiorari, and take this opportunity to declare in no uncertain terms whether Congress properly exercised its power to abrogate the States' Eleventh Amendment immunity in enacting Title VII.

For the foregoing reasons, and on the basis of the authorities cited, petitioners pray that this petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDICES

A. March 26, 1997, Opinion of the United States Court of Appeals for the Fifth Circuit (unreported) .....App. 1

B. August 21, 1996, Ruling on Motion to Dismiss (unreported) .....App. 4

C. April 22, 1997, Ruling on Suggestion for Rehearing En Banc .....App. 6

D. October 31, 1995, Order of Reference .....App. 8

APPENDIX A

In The United States Court of Appeals
for the Fifth Circuit

No. 96-31060
Summary Calendar

JENNIFER MISTRETTA and TROY MISTRETTA,

Plaintiffs-Appellees,

versus

STATE OF LOUISIANA, through the Department of Public Safety and Corrections, Office of State Police, and TIMOTHY BRUNET,

Defendants-Appellants.

Appeal from the United States District Court
for the Middle District of Louisiana
(95-CV-754)

(Filed Mar. 26, 1997)

Before SMITH, DUHÉ, and BARKSDALE, Circuit Judges.

JERRY E. SMITH, Circuit Judge:*

The State of Louisiana and its employee, Timothy Brunett (jointly referred to as "Louisiana"), appeal the denial of their Fed. R. Civ. P. 12(b)(6) motion to dismiss, claiming that the state is entitled to Eleventh Amendment immunity from the Mistrettas' title VII suit. Denials of Eleventh Amendment immunity are appealable under the collateral order doctrine. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144-45 (1993).

* Pursuant to the 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

Louisiana asserts that Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e *et seq.*, does not contain the "unmistakable language" that the Supreme Court has held is required to abrogate Eleventh Amendment immunity. *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243 (1985). Title VII authorizes suits against a "respondent," which is defined to include an "employer." 42 U.S.C. § 2000e(n). "Employer" is in turn defined to include a "person engaged in an industry affecting commerce," *id.* § 2000e(b), and "person" encompasses both "governments" and "governmental agencies", *id.* § 2000e(a). Louisiana argues that although under normal rules of statutory construction this would constitute sufficiently "unmistakable language," it fails to meet the heightened standard imposed by *Atascadero*.

We need not consider whether, were we to address this issue as one of the first impression, we would decide that the mere authorization of suits against "governments" is the sort of unequivocal statutory language that *Atascadero* requires. Prior decisions of both the Supreme Court and this court foreclose Louisiana's argument.

In *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), the Court held that Congress had abrogated the states' Eleventh Amendment immunity by enacting Title VII. *Id.* at 457. Although the focus of the decision was congressional power to abrogate under § 5 of the Fourteenth Amendment, the Court also stated that "the threshold fact of congressional authorization to sue the State as employer is clearly present." *Id.* at 452 (internal quotations and citations omitted). This aspect of the decision was confirmed in *Quern v. Jordan*, 440 U.S. 332 (1979), where the Court explained that the *Fitzpatrick* majority had "found present" "the 'threshold fact of congressional authorization' to sue the State as employer, because the statute made explicit reference to the availability of a private action against state and local governments in the event the Equal Employment

Opportunity Commission or the Attorney General failed to bring suit or effect a conciliation agreement." *Id.* at 344 (quoting *Fitzpatrick*, 427 U.S. at 452).

Louisiana protests that because *Atascadero* is the seminal case on precisely what Congress must do to abrogate state immunity, it "at the very least modified *Fitzpatrick*, if not implicitly overruled it." We disagree, for nowhere in *Atascadero* did the Court even so much as call *Fitzpatrick* into doubt or question its affirmation of that decision in *Quern*. In any case, we are also bound by *Pegues v. Mississippi State Employment Serv.*, 899 F.2d 1449, 1453 (5th Cir. 1990), in which we stated that the Civil Rights Act of 1964 "clearly abrogates the states' Eleventh Amendment immunity by providing that courts may award retroactive monetary relief against state defendants which violate Title VII." *Id.* at 1453. However appealing Louisiana's argument may be, after *Fitzpatrick* and *Quern* it is addressed to the wrong court.

Accordingly, the denial of the motion to dismiss is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

JENNIFER MISTRETTA, ET AL — CIVIL ACTION

VERSUS — NUMBER 95-754-M-1

STATE OF LOUISIANA, ET AL

RULING ON MOTION TO DISMISS

(Filed Aug. 21, 1996)

This matter is before the court, on the motion of defendants State of Louisiana through the Department of Public Safety and Corrections and the Office of State Police, and James T. Brunet, to dismiss the plaintiffs' complaint. The motion is opposed.[1]

The State and Brunet argue that the U. S. Supreme Court's decision in *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S. Ct. 2666, 2671 (1976), holding that the Fourteenth Amendment allowed Congress to abrogate the immunity from suit guaranteed by the Eleventh Amendment thus permitting a state to be sued as a defendant in a Title VII action, must now be questioned based on the more recent decision in *Seminole Tribe of Florida v. Florida*, _____ U.S. _____, 116 S. Ct. 1114 (1996).

This court declines, for the reasons set forth by the plaintiffs in their opposition memorandum, to reverse *Fitzpatrick*, a 20 year old precedent which the Supreme Court itself in *Seminole* did not question. *Seminole*, 116 S. Ct. at 1125, 1128.

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[1] The motion was noticed for hearing on September 6, 1996. Plaintiffs filed their opposition memorandum on August 19, 1996. No oral argument is required, and no useful purpose would be served by waiting until the hearing date to rule on this motion.

Accordingly, the motion of defendants State of Louisiana and James T. Brunet to dismiss is denied.

Baton Rouge, Louisiana, August 21, 1996.

/s/ Stephen C. Riedlinger
United States Magistrate Judge

APPENDIX C

In The United States Court of Appeals
for the Fifth Circuit

No. 96-31060

JENNIFER MISTRETTA; TROY MISTRETTA,
Plaintiffs-Appellees,

v.

STATE OF LOUISIANA, Through the Department of Public Safety and Corrections, Office of State Police; TIMOTHY BRUNET,
Defendants-Appellants.

Appeal from the United States District Court
for the Middle District of Louisiana, Baton Rouge

(Filed Apr. 22, 1997)

ON SUGGESTION FOR REHEARING EN BANC

(Opinion March 26, 1997, 5 Cir., _____, _____ F. 3d _____)

Before SMITH, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:

(✓) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FRAP and Local Rule 35), the Suggestion for Rehearing En Banc is DENIED.

( ) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of

one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FRAP and Local Rule 35), the Suggestion for Rehearing En Banc is DENIED.

Entered for the court:

/s/ Jerry E. Smith
United States Circuit Judge

CHARLES R. FULBRUGE, III
Clerk

*Clerks Note: See FRAP and Local Rules 41 for the stay of the mandate.

APPENDIX D

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

JENNIFER MISTRETTA, ET AL.

VERSUS CIVIL ACTION

STATE OF LOUISIANA, ET AL. NUMBER 95-754-B-M1

(Filed Oct. 31, 1995)

ORDER OF REFERENCE

IT IS HEREBY ORDERED that the foregoing matter be referred to a UNITED STATES MAGISTRATE JUDGE for the conduct of all further proceedings and the entry of judgment in accordance with 28 USC 636(c) and the foregoing consent of the parties.

Baton Rouge, Louisiana, October 31, 1995.

/s/ Frank J. Polozola
United States District Judge

RICHARD MARTIN
Clerk

Supreme Court, U.S.
FILED
JUN 20 1997
OFFICE OF THE CLERK

No. 96-1841

In The

Supreme Court of the United States

October Term, 1996

STATE OF LOUISIANA, *et al.*,

Petitioners,

vs.

JENNIFER MISTRETTA, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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11 pp

LIST OF PARTIES

The parties in this Court and the courts below are as follows:

Petitioners: The State of Louisiana through the Department of Public Safety and Corrections, Office of State Police, and James Timothy Brunett, who are defendants in the district court and the appellants in the Court of Appeals.

Respondents: Jennifer Evans Mistretta and Troy Mistretta, who are plaintiffs in the district court and the appellees in the Court of Appeals.

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REASONS FOR DENYING THE WRIT

I.

THERE IS NO CONFLICT BETWEEN THE OPINION OF THE FIFTH CIRCUIT IN THIS CASE AND PRIOR DECISIONS OF THIS COURT.

Petitioners rely upon Supreme Court Rule 10.1(c) in seeking the grant of their requested Writ because they allege that the Fifth Circuit rendered its opinion in this case in direct conflict with prior decisions of this Court. However, no such conflict as asserted by Petitioners exists.

Most recently, this court in *Seminole Tribe of Florida v. Florida*, __ U.S. __, 116 S. Ct. 1114, 134 L. Ed. 2d 66 (1996), reaffirmed the principle that Title VII, 42 U.S.C. § 2000e, *et seq.*, represents an abrogation of Eleventh Amendment immunity by citing, with approval, this Court's prior decision in *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S. Ct. 2666, 49 L. Ed. 2d 614 (1976). In reaffirming the principles of *Fitzpatrick*, this Court stated:

> Previously, in conducting that inquiry, we have found authority to abrogate under only two provisions of the Constitution. In *Fitzpatrick*, we recognized that the Fourteenth Amendment, by expanding federal power at the expense of state autonomy, had fundamentally altered the balance of state and federal power struck by the Constitution. *Id.*, at 455. We noted that Section(s) 1 of the Fourteenth Amendment contained prohibitions expressly directed at the States and that Section(s) 5 of the Amendment expressly provided that

> "Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." See *id.*, at 453 [internal quotation marks omitted]. We have held through the Fourteenth Amendment, federal power extended to intrude upon the province of the Eleventh Amendment, and therefore, that Section(s) 5 of the Fourteenth Amendment allowed Congress to abrogate the immunity from suit guaranteed by that Amendment.

116 S. Ct. at 1125. As the most recent pronouncement on this issue, this Court found that the Fourteenth Amendment and its subsequent enforcement provisions, such as Title VII, properly abrogate the Eleventh Amendment bar. Certainly, there is no clearer expression of the principles embodied in our Fourteenth Amendment than the right of an "employee" to be treated equally — free from discrimination.

Surely, if this Court intended to question *Fitzpatrick*, it would have done so. Instead, this Court utilized the opinion in *Fitzpatrick* as a clear example of Congress' use of its Fourteenth Amendment power to alter the balance between state and federal power struck by the Constitution. Thus, in its use of this power, Congress could extend federal power into the realm of the Eleventh Amendment. *Fitzpatrick* arose factually, as does the case at bar, from violations of Title VII.

A. *Fitzpatrick* is not in conflict with *Atascadero State Hospital v. Scanlon*

Petitioners base their entire argument on what they perceive to be a conflict between *Fitzpatrick* and *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 105 S. Ct. 3142 (1985), and

their interpretation of *Atascadero*. However, no such conflict exists.

As one of the first Eleventh Amendment decisions, the Court in *Hans v. Louisiana*, 134 U.S. 1, 10 S. Ct. 504, 33 L. Ed. 842 (1890), held that the Eleventh Amendment barred a citizen from bringing suit against his own state in federal court, even though the Amendment does not expressly so provide. However, this immunity is not absolute. The courts recognize well established exceptions to the reach of the Eleventh Amendment bar.

Outlined by this Court in *Atascadero* are examples of the well established exceptions. The first exception given by *Atascadero* derives where a State waives its immunity and consents to suit in federal court. The second exception arises in cases where the Eleventh Amendment is "necessarily limited by the enforcement provisions of Section 5 of the Fourteenth Amendment," that is, by Congress' power to "enforce, by appropriate legislation, the substantive provisions of the Fourteenth Amendment." *Atascadero*, 105 S. Ct. at 3145, citing *Fitzpatrick* with approval.

Nowhere in *Atascadero* does the court even question the reasoning and decision of *Fitzpatrick* wherein Congress' legislative expression of state liability under Title VII was upheld. On the contrary, the *Atascadero* court, citing *Fitzpatrick* with approval, recognizes that one of the areas wherein Congressional Fourteenth Amendment power clearly abrogates Eleventh Amendment immunity is in the exercise of power in amending Title VII.

Pursuant to the 1972 Amendments to Title VII of the Civil Rights Act of 1964, Congress empowered federal courts to award monetary damages in favor of private citizens against a state government found to be in violation of the substantive provisions

of the Act. The Amendments expanded the coverage of Title VII applicable to the states as "employers" by expanding the definition of "employer" as a "person" to include "governments, governmental agencies and political subdivisions." 42 U.S.C. § 2000e. This Court affirmatively stated that Congress intended Title VII and its principles be applied to governmental and private employers alike. *Dothard v. Rawlinson*, 433 U.S. 321, 97 S. Ct. 2720, 2728, n. 14, 53 L. Ed. 2d 786 (1977).

Petitioners maintain that a conflict exists between *Atascadero* and *Fitzpatrick* because Petitioners allege no independent evaluation of Title VII has been performed in light of the *Atascadero* criteria. Petitioners' argument is misleading. This Court already found that Congress expressly intended the 1972 Amendments to Title VII to be applicable to the states in *Dothard*. *Fitzpatrick* established that Congress had the power pursuant to the Fourteenth Amendment to enact the 1972 Amendments to Title VII and that "Congress' exercise of power in this respect is also not barred by the Eleventh Amendment." *Fitzpatrick*, 96 S. Ct. at 2672. *Atascadero*, in citing *Fitzpatrick* with approval, recognized that Title VII was a clear expression of Congressional intent to abrogate the Eleventh Amendment.

Although *Atascadero* did not address Title VII, it clearly cites *Fitzpatrick* as authority. The *Atascadero* Court addressed the Rehabilitation Act under Title VI of the Civil Rights Act of 1964. In the body of its opinion, *Atascadero* cites *Fitzpatrick* in its reiteration that the Eleventh Amendment is "necessarily limited by the enforcement provisions of Section 5 of the Fourteenth Amendment," and that Congress can abrogate the Eleventh Amendment when acting pursuant to the Fourteenth Amendment. *Atascadero*, 105 S. Ct. at 3145, citing *Fitzpatrick*. Therefore, *Atascadero* implicitly recognized Title VII, as amended, to be a clear and unequivocal expression of Congressional abrogation of the Eleventh Amendment.

Thus, it is unequivocally clear that the Fifth Circuit's ruling in the case at bar is not in conflict with *Atascadero*. The Fifth Circuit, in directly addressing Petitioners' concerns held:

> In *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), the Court held that Congress had abrogated the states' Eleventh Amendment immunity by enacting Title VII. *Id.* at 452. Although the focus of the decision was congressional power to abrogate under Section 5 of the Fourteenth Amendment, the Court also stated that "the threshold fact of congressional authorization to sue the State as employer is clearly present." *Id.* at 452 [internal quotations and citations omitted] . . . Louisiana protests that because *Atascadero* is the seminal case on precisely what Congress must do to abrogate state immunity, it "at the very least modified *Fitzpatrick*, if not implicitly overruled it." We disagree, for nowhere in *Atascadero* did the Court even so much as call *Fitzpatrick* into doubt or question its affirmation of that decision in *Quern v. Jordan*, 440 U.S. 332 (1979).

Opinion of the Fifth Circuit, Pet. App. 1a. The same situation is present here. Nowhere under any reading does *Atascadero* even question *Fitzpatrick*. There is clearly no conflict justifying the grant of the Writ sought by Petitioners in this case.

B. The Fifth Circuit's decision in *Pegues v. Mississippi State Employment Service* clearly was correct and its reliance upon *Pegues* was not misplaced

Petitioners additionally argue that the Fifth Circuit erred in

relying upon the decision of *Pegues v. Mississippi State Employment Service*, 899 F.2d 1449 (5th Cir. 1990). However, the Fifth Circuit in *Pegues* correctly concluded that Title VII affords federal courts the ability to assess liability against a state as an abrogation of the Eleventh Amendment. The *Pegues* court, in assessing Title VII in light of the Eleventh Amendment and the exceptions thereto, held "the Act [Title VII] clearly abrogates the states' Eleventh Amendment immunity by providing that courts may award retroactive monetary relief against state defendants which violate Title VII". *Pegues* at 1453.

Petitioners suggest that *Pegues* also was wrong because "nowhere does Title VII provide that the federal courts may award monetary relief against 'state defendants' for violations of the Act." Petitioners' Petition for Writ of Certiorari at 15. Petitioners' argument is misleading. Title VII is expressly applicable to the State of Louisiana and allows back pay, front pay, and other monetary relief, including damages, as a remedy for violations of the Act. One need only review the definition of "employee" as contained in 42 U.S.C. § 2000e(f) which mandates that "employee" includes an employee of a state. Also, the definition of "person" in 42 U.S.C. § 2000e(a) contains similar language as 42 U.S.C. § 1981a. The State of Louisiana has already successfully argued that the language "government, governmental agency, or political subdivision" contained in 42 U.S.C. § 1981a clearly means them. The State of Louisiana argued that this language specifically applies to them so that they cannot be liable for punitive damages under 42 U.S.C. § 1981a, but somehow the identical language in Title VII is not.

Petitioners' seek this Writ because they allege a conflict between decisions. Respondents limit their argument only to the merits of Petitioners' request for the Writ. Under any analysis, there is no conflict between decisions.

CONCLUSION

Petitioners fail to demonstrate any conflict between the decision of the Fifth Circuit in the case at bar and any prior decisions of this Court. There exists no reason to disturb that which is patently clear upon a fair reading of all of the decisions cited by Petitioners. Title VII clearly and unequivocally applies to the State of Louisiana and Eleventh Amendment immunity is not available.

Respectfully submitted,

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